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KHOO KAY PENG v. PAULINE CHAI SIEW PHIN

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[ORIGINATING SUMMONS NO: F24-49-02-2013]
25 FEBRUARY 2015

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CIVIL PROCEDURE: *Stay of proceedings – Application for – Stay of court order pending appeal to Court of Appeal – Whether special circumstances existed to justify stay – Balance of justice and hardship – Whether court deemed fit to grant stay sought – Whether stay should be granted automatically – Courts of Judicature Act 1964, s. 73*

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FAMILY LAW: *Divorce – Proceedings – Stay of execution – Application for – Stay of court order pending appeal to Court of Appeal – Special circumstances – Whether existed to justify stay – Balance of justice and hardship – Whether court deemed fit to grant stay sought – Whether plaintiff should be allowed to proceed unhindered with divorce petition*

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The defendant had filed divorce proceedings against the plaintiff in the High Court of England. The plaintiff contested jurisdiction of the English High Court and proceeded to file encl. 1 in the Malaysian High Court for, *inter alia*, an exemption from the requirement for reference to a conciliatory body under s. 106(1) of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA'). The defendant, however, applied for all the proceedings in encl. 1 to be stayed pending the hearing and disposal of the divorce petition by the High Court of England *vide* encl 6. On 28 November 2014, the Malaysian High Court allowed encl. 1 ('court order') and dismissed encl. 6. Accordingly, the plaintiff filed a divorce petition at the Kuala Lumpur High Court. The defendant, *vide* encl. 103, applied for a stay of execution of the court order pending appeal to the Court of Appeal. The grounds raised in support for the application for a stay of execution by the defendant, amongst others, were (i) jurisdiction; (ii) additional costs; and (iii) balance of justice or hardship. As such, the issue that arose for the court's determination was whether there was any special circumstances that justified the stay of execution.

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Held (dismissing defendant's application in encl. 103 with costs):

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(1) Under s. 73 of the Courts of Judicature Act 1964, an appeal did not operate as a stay. Further, on the facts, the merits of an appeal did not constitute special circumstances to justify a stay. The Court of Appeal had also decided earlier in the defendant's appeals that the Malaysian Court was the appropriate forum for these proceedings. Additional costs incurred by the defendant did not constitute special circumstances. The defendant chose to initiate the divorce petition in the English High Court and therefore she must be prepared to bear the expenses incurred in prosecuting/instituting those proceedings against the plaintiff there. (paras 5, 8, 10 & 13)

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(2) The court recognised that if no stay was granted, and should the defendant succeed in the appeal later on, then the defendant's success at the appeal could be rendered nugatory. Nugatoriness is a species of special circumstances to justify a stay. However, nugatoriness must be weighed in the balance against the plaintiff's right to enjoy the fruits of the success of his litigation. Since the plaintiff had succeeded in his action, he should be allowed to file the divorce petition without first having to refer the matrimonial difficulty to the conciliatory body. In the interest of justice, the balance of justice or hardship was weighed in favour of the plaintiff. Thus, he should be allowed to proceed unhindered with his divorce petition. (paras 15, 16, 17 & 20)

(3) The High Court had dismissed the defendant's application in encl. 6 for a stay of the proceedings for the originating summons in encl. 1. On appeal, the Court of Appeal had also dismissed the defendant's appeal regarding encl 6. This meant that the Court of Appeal did not deem it fit to grant the defendant the stay sought. It did not appear to be appropriate to now stay the execution of the court order pending the outcome of the defendant's appeal to the Court of Appeal. (paras 22 & 23)

(4) The defendant had initiated divorce proceedings by filing her divorce petition in the English High Court ahead of the plaintiff, and maintained during the trial that she would not withdraw that divorce petition. On the other hand, the defendant also relied on s. 106(5) of the LRA in an attempt to reach an amicable settlement on property and maintenance, but without any intention to discontinue her divorce proceedings in England. The matters of maintenance and division of property after divorce are not governed by s. 106(5) of the LRA, but by ss. 77-81 and s. 76 of the LRA. The defendant's heavy reliance now on s. 106(5) of the LRA gave rise to the suspicion that she was merely using that provision to delay the proceedings of the divorce petition filed by the plaintiff. (para 29)

Case(s) referred to:

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1974] 1 LNS 136 FC ***(refd)***

Serangoon Garden Estate Ltd v. Ang Keng [1953] 1 LNS 98 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 3, 73

Law Reform (Marriage and Divorce) Act 1976, ss. 76, 77, 78, 79, 80, 81, 106(1)(vi), (5)

Rules of the Court of Appeal 1994, r. 12

A *For the plaintiff - Romesh Abraham (Goh Siu Lin & Bong Ying Wei with him); M/s Shook Lin & Bok*

For the defendant - Andrew Yong (New Sin Yew & Jane Tai Le Qian with him); M/s Bon Advocs

Reported by Sandra Gabriel

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JUDGMENT

Yeoh Wee Siam J:

Introduction

C **[1]** On 28 November 2014, after a full trial of the originating summons, I granted the plaintiff his application in encl. 1 made under s. 106(1)(vi) of the Law Reform (Marriage and Divorce) Act 1976 ("the LRA"). The effect of the order is that the plaintiff is given the exemption sought under the same section and leave to file a divorce petition without first having to refer his D matrimonial difficulty with the defendant to the conciliatory body.

[2] Pursuant to the order, the plaintiff had filed Divorce Petition No. 33-650-12-2014 on 4 December 2014 at the Kuala Lumpur High Court, Family Division.

E **Enclosure 103**

[3] This is the application by the defendant for stay of execution of the court order dated 28 November 2014 pending the defendant's appeal to the Court of Appeal filed on 1 December 2014.

F **Court's Decision Given On 23 January 2015 Regarding Encl. 103**

[4] The defendant's application is dismissed. Costs of RM4,000 are to be paid by the defendant to the plaintiff.

The Law

G **[5]** Under s. 73 of the Courts of Judicature Act 1964, an appeal does not operate as a stay.

[6] The guiding principles on whether to grant a stay of execution are laid down in *Serangoon Garden Estate Ltd v. Ang Keng* [1953] 1 LNS 98; [1953] MLJ 116 where two main principles should be considered:

H (a) the court will not deprive a successful party of the fruits of his litigation until an appeal is determined; and

(b) whether the unsuccessful party can show special circumstances to justify a stay.

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Whether The Various Factors Raised By The Defendant Constitute Special Circumstances To Justify A Stay Of Execution ("Stay")

Merits Of The Defendant's Appeal To The Court Of Appeal

[7] The defendant contended that there are merits to her appeal regarding, *inter alia*, the following important and novel questions of law:

(i) whether the legal doctrine of coverture applies in Malaysia;

(ii) whether the Convention On The Elimination Of All Forms Of Discrimination Against Women ("CEDAW") has any impact on the issues regarding domicile in Malaysia;

(iii) whether the defendant, as a wife, has her own domicile of choice which is independent from that of her husband's domicile;

(iv) the principle of judicial comity bearing in mind that this court has made a decision which "flies across the face of the earlier decision of the English High Court".

[8] The above issues have been considered fully by this court in its judgment dated 28 November 2014, and I have already decided on those issues. In any case, the merits of an appeal do not constitute special circumstances to justify a stay.

[9] In *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1; [2004] 1 MLJ 257, the Federal Court at p. 269 of its judgment referred to the case of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No. 2)* [1974] 1 LNS 136 where Lee Hun Hoe CJ (Borneo), in considering whether there are special circumstances stated, *inter alia*, "it is therefore unnecessary for me to consider the merits of the respective case …".

Appropriate Jurisdiction

[10] In regard to the issue of appropriate jurisdiction, I bear in mind that the Court of Appeal had also decided earlier in the defendant's appeals regarding encls. 1 and 6 of this same case that the Malaysian Court is the appropriate forum for these proceedings.

Defendant's Appeal May Have Flaws

[11] Learned counsel for the plaintiff submitted, *inter alia*, that there may be flaws in the defendant's notice of appeal in the event that the defendant pursues her appeal regarding this court's directions given on 29 August 2014 and 24 October 2014 during case management since:

(i) such rulings or matters are not appealable in view of the definition of 'decision' in s. 3 of the Courts of Judicature Act 1964; and

(ii) the appeal on the rulings was filed out of time ie, beyond the 30 days required by r. 12 of the Rules of the Court of Appeal 1994.

There is no certainty that the defendant would succeed in her appeal to the Court of Appeal regarding the originating summons.

Alex's Medical Condition

[12] The issue regarding the medical condition of the child, Alex, was considered by me in the judgment dated 28 November 2014. Alex's medical condition is not a special circumstance to justify a stay. The defendant can always arrange for Alex's alternative care. Moreover, Alex is not a child within the meaning of the LRA. He is also not a party to these proceedings. Furthermore, the medical report of Alex exhibited by the defendant is outdated ie, being dated 24 April 2014.

Additional Costs

[13] The additional costs incurred by the wife do not constitute special circumstances. The defendant chose to initiate the divorce petition in the English High Court and therefore she must be prepared to bear the expenses incurred in 'prosecuting'/instituting those proceedings against the plaintiff there.

No Non-Molestation And Occupation Order Here

[14] Regarding the defendant's submissions that she does not have in Malaysia a non-molestation order and occupation order as the ones that she had obtained from the English High Court, I do not think that factor can amount to special circumstances to justify a stay. If the defendant wishes to have the protection of such equivalent orders in Malaysia, she can apply for such orders, in the Malaysian Court, but she did not do so. Be that as it may, there is no evidence that when the defendant came to Kuala Lumpur for the hearing of this originating summons (encl. 1), there were violent acts, or threats of molestation or violence, committed or made against her by the plaintiff.

Balance Of Justice Or Hardship

[15] In this case, I am of the view that the balance of justice or hardship tilts in favour of the plaintiff. This court recognises that if no stay is granted, and should the defendant succeed in the appeal later on, then the defendant's success at the appeal can be rendered nugatory. Nugatoriness, according to case law, is a species of special circumstances to justify a stay.

[16] However, nugatoriness must be weighed in the balance against the plaintiff's right to enjoy the fruits of the success of his litigation.

[17] Bearing in mind that the plaintiff has succeeded in this action, he should be allowed to file the divorce petition without first having to refer the matrimonial difficulty to the conciliatory body.

[18] When the court granted the plaintiff the exemption from reference to the conciliatory body, it does not tantamount to allowing the plaintiff's divorce petition at this stage.

[19] It appears that the divorce petition filed by the plaintiff in December 2014 has yet to be proceeded with further considering that the present solicitors for the defendant have no instructions to accept service, and the plaintiff has to apply to the court for leave for service outside jurisdiction on the defendant.

[20] The court also considers the age of the plaintiff, being 75 years old. Thus, in the interest of justice, the balance of justice or hardship is weighed in favour of the plaintiff. He should be allowed to proceed unhindered with his divorce petition.

[21] As submitted by learned counsel for the plaintiff, a stay would 'substantially prejudice' the plaintiff if he is not allowed to proceed in accordance with the order of this court dated 28 November 2014.

Defendant's Previous Stay Application Dismissed By High Court, And Defendant's Appeal Dismissed

[22] The court also notes that in the previous proceedings, the High Court had dismissed the defendant's application in encl. 6 for a stay of the proceedings for the originating summons in encl. 1. On appeal, the Court of Appeal had also dismissed the wife's appeal regarding encl. 6. This means that the Court of Appeal did not deem it fit to grant the defendant the stay sought by her.

Federal Court Ordered Expeditious Hearing

[23] I further considered the fact that the Federal Court had on 4 August 2014 ordered that the issue of jurisdiction and domicile be heard on an expedited basis. This court has heard expeditiously the originating summons and given its decision on 28 November 2014. It does not appear to be appropriate to now stay the execution of the court order dated 28 November 2014 pending the outcome of the defendant's appeal to the Court of Appeal.

Public Policy Not Special Circumstances Here

[24] The issue of public policy cannot amount to special circumstances in this case. The respective divorce petitions of the defendant and plaintiff are only between two private individuals in two different jurisdictions, and nothing more. Even if a stay is not allowed here, contrary to the submissions of learned counsel for the defendant, it does not mean that it would scuttle the defendant's divorce proceedings in the English High Court, or cause any confusion between the two jurisdictions. I have addressed that in my judgment dated 28 November 2014.

A *Defendant's Attempt To Delay Proceedings*

[25] On the whole, it is obvious to this court that this stay application is an attempt by the defendant to stop or delay the expeditious disposal of the plaintiff's divorce petition filed pursuant to the order dated 28 November 2014. It is clear that the defendant is attempting to gain lead time over the B plaintiff in order to pursue the divorce proceedings instituted by her in the English High Court.

Plaintiff Does Not Consent To A Stay Here

[26] I consider the fact that the English Court of Appeal had on C 19 December 2014 granted leave to the plaintiff to appeal against the decision of the English High Court of 17 October 2014. I further note that the stay order granted by Mr Justice Bodey in the English High Court is only a limited stay since the defendant is allowed to pursue ancillary orders in regard to maintenance, legal payment, and property (see para. 9 of the order D of the English High Court dated 17 October 2014 *vis a vis* paras. 10-12 of the same order).

[27] It cannot be argued here by the defendant that a stay should be granted in this case since a stay was granted in the English High Court. I bear in mind that in the English High Court proceedings, the defendant had consented to E the stay of those proceedings, but not the plaintiff in this application to these proceedings.

No Good Reason To Grant A Stay

[28] As I have stated in my judgment dated 28 November 2014, there are F no parallel or concurrent proceedings in the English High Court similar to the plaintiff's application for exemption from reference to the conciliatory body under s. 106(1)(vi) of the LRA. Thus, there is no good reason to stay these proceedings in Malaysia.

Section 106(5) Of The LRA Cannot Be Used To Get A Stay

G **[29]** Regarding the submissions of learned counsel for the defendant on s. 106(5) of the LRA, I have already considered those issues in my judgment dated 28 November 2014. I observe that the defendant appears to be blowing hot and cold. On the one hand, she had initiated divorce proceedings by filing her divorce petition in the English High Court ahead of the plaintiff, and H maintained during the trial before me that she would not withdraw that divorce petition. On the other hand, she is also relying on s. 106(5) of the LRA in an attempt to reach an amicable settlement on property and maintenance, but without any intention to discontinue her divorce proceedings in England. The matters of maintenance and division of property I after divorce are not governed by s. 106(5) of the LRA, but by other governing substantive provisions in the LRA, such as ss. 77-81 and s. 76. The defendant's heavy reliance now on s. 106(5) of the LRA gives rise to the suspicion that she is merely using that provision to delay the proceedings of the divorce petition filed by the plaintiff.

Decision

[30] Based on the foregoing considerations, I am satisfied that there are no special circumstances to warrant a stay of execution of the court order dated 28 November 2014 pending the defendant's appeal on the same to the Court of Appeal. Therefore, the defendant's application ought to be dismissed.

Order accordingly.